NO. 5373

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. CLEMENS HORST COMPANY,
A CORPORATION,
Plaintiff in Error,

VS.

THE HARTFORD ACCIDENT AND INDEMNITY COMPANY,
A CORPORATION,
Defendant in Error.

Brief of Defendant in Error

Upon Appeal from the United States District Court for the District of Oregon.

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STATEMENT

Under the stipulation filed herein (R. 48), it is agreed that the facts contained in the stipulation shall be deemed admitted for the purposes of the demurrer. It will be noted that the facts as stated in the stipulation differ from some of the allegations

of the complaint, and particularly paragraph VIII (R. 80). It appears, therefore, from the record that on August 5, 1925, at Portland, Oregon, plaintiff entered into a contract with W. P. Rogan and Margaret E. Rogan, his wife, under the terms of which the Rogans were to be employed by plaintiff, commencing September 1, 1925, in hop picking at plaintiff's hop yards near Eola, Oregon, and were to be conveyed free of charge from Salem, Oregon, to plaintiff's hop yards.

On July 27, 1925, defendant, Hartford Accident and Indemnity Company, issued to plaintiff its employer's liability policy, a copy of which is attached to the complaint (R. 17).

On August 29, 1925, W. P. Rogan and Margaret E. Rogan, while being conveyed free of charge by plaintiff from Salem to plaintiff's hop yards, suffered injuries as a result of their falling off of plaintiff's truck. They were at the time of the accident going to plaintiff's hop yards, where they were to commence picking hops for plaintiff on September 1st at a stated price per pound.

It is stipulated that hop picking constituted the only work the Rogans were to perform, and no such work was ever performed by them (R. 51). Going to the place where two days later they were to become employed in picking hops constituted no part of the work or employment of the Rogans. Whether

they traveled on a free truck supplied and operated by plaintiff, or made the trip on foot, they were not, at the time of the accident, employed, or "employees," within the provisions of the insurance contract issued by defendant to plaintiff. They did no work "at or about the work of the assured described in Warranty 4"; they were not engaged in any "operations necessary, incident to, appurtenant thereto, or connected therewith." After arriving at plaintiff's hop yards, the Rogans could have declined to accept the proposed employment. They were at no time subject to the directions or control of plaintiffs as employees, or otherwise.

The material portions of the policy of insurance issued by the defendant in error to the plaintiff in error, provide as follows:

> "Liability for Bodily Injuries or Death.
>
> "(1) To indemnify the assured * * * against loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries * * * suffered * * * as the result of an accident * * * by any employee * * * *while at or about the work of the assured described in Warranty 4,* which for the purpose of this insurance shall include all operations necessary, incident or appurtenant thereto, or connected therewith, whether such operations are conducted at the work places defined and described in the warranties, or elsewhere in connection with or in relation to such work places, except," etc. (R. 17).
>
> * * * * * *

"Premium Computation.

"I. The premium is based upon the entire remuneration earned during the policy period by all employees of the assured * * * *engaged in the work described in and covered by this policy.* * * * (R. 22).

"Definitions.

"M. The term 'remuneration,' used in this policy, shall be construed to mean all salaries, wages, earnings for regular time, overtime, piece-work, bonuses or allowances," etc. (R. 24).

"Endorsement Covering Piece Workers.

"It is hereby understood and agreed that the word 'Employees' wherever used in the undermentioned policy shall include all piece workers and tenants under contract or sub-contract; and that the contract price * * * per ton for hop picking shall be used as the basis for the computation of premium under the below mentioned policy.

* * * * * *

"Nothing herein contained shall be held to vary, waive, alter, or extend any of the terms, conditions, agreements, or warranties of the undermentioned policy, other than as above stated." (R. 28-29.)

* * * * * *

"Warranties.

"Item 2. Locations of all shops, yards, buildings, premises or other work places of this assured, by town or city, with street and number. Anywhere in Marion and Polk Counties, Oregon. (R. 30.)

* * * * * *

"Item 4. *A complete description of the work covered by this policy,* the estimated remuneration of assured's employees engaged in such work, the premium rate or rates, and the deposit premium are as follows:

"*Description of Work Covered by This Policy*—HOP PICKING: Including all work incidental thereto, including drivers, chauffeurs (not private) and their helpers, out-servants, occasional out-servants, also managers, superintendents and foremen engaged wholly or partly in field work." (R. 30 and 31.)

The question for determination upon the demurrer is whether, under the terms of the insurance policy, the Rogans were "employees" at the time of the accident. The indemnity provided by the insurance contract is limited to "loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries * * * suffered * * * as the result of an accident occurring while this policy is in force, by any employee * * * *while at or about the work of the assured described in Warranty 4.*" (R. 17.)

Reference to paragraph 4 discloses that the class of employment to which the assured's contract is limited, is "hop picking—including all work incidental thereto."

The parties entered into a stipulation (R. 48) in which it is provided that:

"The only work to be performed by said Rogans under said contract was to pick hops for

> plaintiff at.....cents per pound, and no such work was actually performed by either of said Rogans for plaintiff." (R. 51.)

The Rogans brought action against plaintiff on the ground of the alleged negligence of plaintiff in driving its truck along the highway between Salem and plaintiff's hop yards. Thereafter, plaintiff and this defendant entered into said stipulation, by which defendant waived the terms of paragraph C. (R. 20) of the insurance policy, and plaintiff compromised the causes of action between itself and the Rogans by the payment to the Rogans of $4000.00. Plaintiff now seeks to recover this amount, plus attorney fees in this and the Rogan actions, claiming that the Rogans were at the time of the accident employees of plaintiff, and that they were covered by the insurance contract. The demurrer primarily involves the determination of the meaning of the insurance contract. The demurrer should not be determined under the rules applicable to questions involving the meaning of the word "employee" under workmen's compensation laws of the different states. It should be interpreted by reference to the terms and provisions of the policy and the intent and purpose of the parties to the insurance contract as gathered from its own provisions. Plaintiff in its brief has cited numerous decisions based upon the workmen's compensation laws of the various states. In this connection, however, the Court will not overlook the fact that

Workmen's Compensation Acts are held to be remedial in character, and for this reason are to be given a liberal construction.

POINTS AND AUTHORITIES

I.

The Rogans were not employees of or engaged in any work of the assured at the time of the accident.

Boyle-Farrell Land Co. vs. Standard Acc. Ins. Co., 24 Fed. (2d), (Mch. 29, 1928, Advance Sheet No. 1).

Putnam vs. Pacific Monthly Co., 68 Ore. 36.

Susznik vs. Alger Logging Co., 76 Ore. 189.

Wells vs. Clark-Wilson Lumber Co., 114 Ore. 297.

II.

A laborer being transferred from one place to another for the purpose of engaging in employment, is a passenger, and not an employee. Travel by an employee wholly disconnected from his service, made him a passenger and not an employee.

Louisville & N. R. Co. vs. Scott, 108 Ky. 392 (56 S. W. 674).

C. R. T. Co. vs. Venable, 105 Tenn. 460 (58 S. W. 861).

Johnson vs. Texas Central Road Co., 42 Civ. App. 604 (93 S. W. 433).

III.

Plaintiff was traveling on a pass to a place where he expected to obtain employment from the defendant, but the service was not to begin until he arrived at his destination. On this account he was held not to be an employee but a passenger.

Williams vs. Oregon Short Line Co., 18 Utah 210 (54 Pac. 991, 72 Am. St. Rep. 777).

Harris vs. Puget Sound Electric Railway Co., 52 Wash. 289 (100 Pac. 838).

IV.

The test as to when a person is acting as a servant of another is to ascertain whether at the time when the injury was inflicted, he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders or misconduct.

Employers' Indemnity Co. of Phila. vs. Kelly Coal Company, 149 S. W. 992 (41 L. R. A. (N. S.) 963).

V.

The question as to the liability of an insurance company should be determined by reference to the provisions of the contract of insurance.

Maycreek Logging Co. vs. Pacific Coast Casualty Co., 82 Wash. 301 (144 Pac. 67, 55 L. R. A. (N. S.) 1915C. 155).

Western Indemnity Co. vs. Industrial Accident Commission of Calif., 43 Cal. App. 487 (185 Pac. 306).

VI.

The liability of the insurance company upon this policy cannot be extended by implication beyond the strict terms of the policy. Where the parties have entered into a contract that alone may be looked to as furnishing the measure of their rights and obligations.

New Amsterdam Casualty Co. vs. State Industrial Accident Co. (Okla.), 193 Pac. 974.

Brown vs. Conn. Fire Insurance Co., 52 Okla. 392 (153 Pac. 173).

Byrd & Bryan et al. vs. Georgia Casualty Co. (N. C.), 114 S. E. 1.

Jerome Hardwood Lumber Co. vs. Consolidated Underwriters et al. (Ark.), 256 S. W. 68.

Horseshoe Coal Co. vs. Maryland Casualty Co. et al. (Ky.), 271 S. W. 671.

VII.

Not only must the formal contract have been made, but the claimant must have actually entered upon his duties pertaining thereto.

28 R. C. L. 760.
Ann. Cas. 1918B, 706.
114 N. E. 517.
28 R. C. L. 804.
Donovan's Case, 217 Mass. 78 (104 N. E. 431).

VIII.

An injury "arises out of the employment when there is * * * a causal connection between the conditions under which the work is required to be performed and the resulting injury."

28 R. C. L. 797, 801, 805.

IX.

The present case cannot properly be determined by the decisions under the Workmen's Compensation Act. The Act being remedial in its nature is given a liberal construction.

28 R. C. L. 755.

Dunn vs. Trego et al. (Pa.), 124 Atl. 175, para. 2.

ARGUMENT

The demurrers to the complaint and amended complaint were argued and re-argued at great length, orally and in briefs, in the presentation of the matter before United States District Judge Robert S. Bean. Every question raised in the brief filed herein by plaintiff in error was fully presented and carefully considered by the trial court. Fifty-two of the fifty-seven decisions and authorities cited by plaintiff in error herein were cited in the briefs presented to the trial court. The trial court heard the matter on the briefs and oral arguments presented to it and rendered its decision against the plaintiff. There-

after the Court, on plaintiff's motion, gave plaintiff a rehearing, and again rendered its decision against the plaintiff. It is probable that no other or further argument need be made herein than a mere reference to Judge Bean's decision upon the rehearing, as the same appears commencing at page 71 of the transcript.

It seems to us the case involves the simple question of the interpretation of a written contract.

An inventory of the law library of counsel for plaintiff is not essential to a proper determination of the matters presented to the Court in this case. The questions involve only the usual and plain rules of law applicable in the construction of written contracts. This is not an action brought by an injured employee against a negligent employer. It is not an action based on a claim under the Workmen's Compensation Law of this or any other state. It is an action betwen two corporations based upon, and the rights of the parties limited to, the terms of a written instrument. The terms of that instrument are not ambiguous. The defendant agreed to indemnify the plaintiff against loss growing out of one class of service, namely:

> "4. *A complete description of the work covered by this policy,* the estimated remuneration of assured's employees *engaged in such work,*

the premium rate or rates, and the deposit premium are as follows:

"Description of work covered by this policy:

"Hop Picking—Including all work incidental thereto—including drivers, chauffeurs (not private) and their helpers, out-servants, occasional out-servants, also managers, superintendents and foremen engaged wholly or partly in field work." (R. 30 and 31.)

There is nothing said in this policy about indemnifying plaintiff against loss caused by its negligence in transporting persons from one domicile to another.

The liability, if any, of the Horst Company to the Rogans on account of its negligence in transporting them from Salem three days before the work covered by the policy was to commence, is not a liability covered by the terms of the policy or paid for by the plaintiff, the premiums being based upon the remuneration paid by plaintiff to its employees for their services in hop picking at a stated price per pound.

On pages 2 and 3 of plaintiff's brief reference is made to the coverage clauses of the policy. It will be noted, however, that the coverage is limited to injuries suffered by "an employee or employees of the assured, *while at or about the work of the assured described in Warranty 4,*" and operations incident or appurtenant thereto or connected therewith. The

word "operations" clearly refers to work incident to or connected with hop picking. The added provision that the policy shall "cover all the operations of the assured in Oregon, whether or not such operations are declared under Warranty 4," necessarily refers to the operations of the assured in hop picking. It does not cover the negligence of the plaintiff in transporting the Rogans three days before the time the employment was to commence, any more than it would have covered a liability growing out of the negligence of plaintiff in transporting the Rogans on August 5th. The quotation from the policy on page 3 of plaintiff's brief, refers to employees of the assured who are

> "hired *and employed* in Oregon, wherever such employees may be temporarily sent in the United States of America or Canada, *in the performance of their duties.*"

Here it is plain that the insurance contract is limited to work done "in the performance of their duties" as hop pickers.

Furthermore, the written stipulation entered into between the parties hereto recites that

> "The only work to be performed by said Rogans under said contract was to pick hops for plaintiff at ... cents per pound, and no such work was actually performed by either of said Rogans for plaintiff."

Notwithstanding our belief that the Court will not find it necessary to read all of the fifty-seven cases cited, many of which are based upon State Compensation Acts, to which a liberal construction is given, we shall later herein discuss some of the cases referred to.

Several pages of the plaintiff's brief, commencing at page 18, relate to an alleged profound distinction made in a case where an employment agent, having reason to believe that employment might be secured at a particular place, without orders from the possible or probable employer, and another wherein the employer had expressly authorized the employment agent to send him a person for a particular job. We do not deem it necessary to discuss these matters, other than to say that, granted that Mrs. Henderson was vested with plenary, unquestioned and unlimited powers as an agent for plaintiff, such agency powers and the contract entered into with the Rogans did not constitute the Rogans at the time of the accident employees within the meaning or terms of the indemnity contract. To come within the terms of that contract at least two things were essential: they must have entered into an employment contract, and must also have actually entered upon the performance of their duties as *hop pickers* or work incidental to hop picking; in other words, as stated in the Putnam case, 68 Or., at pages 45 and 55:

> "Many other cases might be cited on this question, and it is impossible to reconcile them

all to a certain standard; but upon mature consideration we deduce this result: If, as part of the compensation to the employee the carrier agrees to transport the former to and fro between certain points *when not engaged in actual service or when the travel is not closely connected with the employment,* the employee *must be considered a passenger* because the carrier is for hire or is in a sense paid for by the work which the employee performs."

"But holding plaintiff strictly to the pleading, and assuming for the purpose of this case that it was necessary for deceased to use the elevator in order to reach the place where her work was to be performed, does not, in my view of the case, make her a servant of the defendant while so using it, or differentiate her in any way from any other passenger thereon."

And even under the Workmen's Compensation law—

"Not only must the formal contract have been made, but the claimant must have actually entered upon his duties pursuant thereto." (28 R. C. L. 760; Ann. Cas. 1918B. 706; 114 N. E. 517.)

"The employee must show, as he was required to establish under the common law, that he was at the time of the injury engaged in the employer's business, or in furthering that business, and was not doing something for his own benefit or accommodation." (28 R. C. L. 804.)

What possible bearing upon the question before this Court has the distinction, made by Judge Stapleton and approved by Justice McBride, between an

employment agent without power to make a definite contract of employment and one given such power? We have not questioned Mrs. Henderson's agency.

Plaintiff's statement on page 22 of its brief, that the Rogans "were already employees of the Horst Company," is simply an erroneous conclusion of counsel. And on page 23 of the brief it is said that

> "Upon arrival they (the Rogans) could have refused to work, but they could not have legally recovered the money paid for their cabin, and by their refusal they would have been guilty of a breach of contract."

The only breach of contract of which the Rogans could have been guilty would have been their refusal to pick hops, and they could not have been guilty of this breach until after September 1st, because their contract was only to pick hops beginning September 1st. This alone is a sufficient answer to plaintiff's claim that the Rogans were, *at the time of the accident,* employees of the plaintiff. We understand the rule to be that—

> "Not only must the form of contract have been made, but the claimant must have actually entered upon his duties pursuant thereto, or that he shall in any event become subject *eo instanti* to the orders of the employer."

In any event, under no rule of law or reasonable interpretation of the indemnity contract, can it be

said that the Rogans were at the time of the accident, employed in the kind of services covered by the indemnity contract.

The Wells vs. Clark Wilson Lumber Company case (114 Or., page 297), is quoted on page 26 of plaintiff's brief, to the effect that one may be under such a contract with another as to be a present employee, although the actual work incident to the employment may not be begun until a future date. We have no quarrel with this rule, but we insist that it is wholly inapplicable to the situation before the Court in the present case. Certainly a person might be hired and under pay and subject to the orders and directions of his employer prior to the performance of any service, but the Rogans were not in this situation. Their employment was to start from September 1st, and their compensation was to start from that day, and they were not to become subject to the control or direction of the plaintiff until that day. It requires a peculiar process of reasoning to sustain the statement that the Rogans

> "became employees of the Horst Company at Portland on August 5th, 1925, although the actual work incident to their employment was not to begin until September 1st, 1925" (p. 26 of plaintiff's brief).

If it is necessary to go beyond the terms and limitations contained in the insurance contract itself,

then reference should be had to the three Oregon Supreme Court cases in which the term "employee" is considered and discussed. These cases are:

Putnam vs. Pacific Monthly Co., 68 Or. 36.
Susznik vs. Alger Logging Co., 76 Or. 189.
Wells vs. Clark-Wilson Lumber Co., 114 Or. 297 (235 Pac. 283).

In the Putnam case, plaintiff was an employee of defendant. Defendant occupied the fourth floor of a building where plaintiff was employed, and had exclusive control and management of the elevator used by its employees in going to and from its place of business.

> "The plain deduction from the testimony also is that the unfortunate girl was on her way to work, for its shows that the distressing accident took place only ten minutes before the hour at which she was required to begin her labors. It is not shown that her compensation was increased or diminished by reason of her use of the elevator in going to her work. That contrivance was manifestly maintained for the convenience of those going to and from the place of business of the defendant, and it is so stated in substance in the complaint." (Page 42.)

After stating the varying holdings of the several authorities on the question as to when a person is an employee and when a passenger, Justice Burnett in

the above case, commencing at the bottom of page 45, says:

> "Many other cases might be cited on this question, and it is impossible to reconcile them all to a certain standard; but upon mature consideration we deduce this result: If, as part of the compensation to the employee the carrier agrees to transport the former to and fro between certain points *when not engaged in actual service or when the travel is not closely connected with the employment,* the employee *must be considered a passenger* because the carrier is for hire or is in a sense paid for by the work which the employee performs."

On the other hand, it is stated by Justice Burnett, at the bottom of page 46, that:

> "In the case in hand the elevator was *immediately connected* with the place of employment as a convenience both to employer and employee. It was a part of the duty of the latter to attend *at the place to begin work at a stated hour,* and, aside from the pleading on that subject, the decedent was so manifestly going to her work and her presence in the elevator *was so immediately connected with her employment,* that she must be held to be an employee rather than a passenger."

In the case under consideration, however, it was not a part of any duty, under their contract to pick hops for plaintiff, for the Rogans to "attend at the place (of the accident) to begin work at a stated hour." They had not yet reached the place of em-

ployment, and their employment was not to begin until two days later. Neither was the presence of the Rogans at the place of the accident "so immediately connected with" their employment that they could be held at that time to have been employees within the terms of their contract, which specifically limited and defined the class of work which they were employed to perform and the time and place such work was to be performed.

If the Rogans had been injured at the place where their accident happened while being transported by someone other than plaintiff, it would not be claimed by the plaintiff that the Rogans were at that time "employees."

Upon rehearing of the Putnam case, it is said, commencing on page 54, that:

> "Upon this rehearing we carefully examined this case, and, while a majority of the court are still of the opinion that it should be reversed, we think the opinion should be modified in two respects: (1) In holding that the relation of the defendant to the deceased was that of master and servant * * * The testimony shows that the deceased was employed by defendant *as a stenographer on the fourth floor of the building;* that her duties began at 8:30 in the morning, and that the accident happened at 8:20. At the time of the accident her time was her own. She was not the servant of the defendant until it was time for her to begin such service. This is not a case like

> many of those cited in the opinion, where a laborer *going to his work* is injured in the course of transportation. In such cases the time so occupied is the time of the employer, and is paid for by him. The service is being rendered just as effectually by the employee when he is being transported from one section of the road to another as when he is laying ties or grading. It is true that the complaint alleges that deceased was compelled to use the elevator in order to reach the room where she was employed, but this allegation is denied, and the testimony disclosed that there was a stairway which she could have used instead of the elevator."

The above differentiation made by the Court between the case under consideration and those in which employees going to work, while in the course of their employment and while they were under pay, is applicable to the present case in this: That the Rogans were not under pay and were not at the time going to work within the meaning of the rule as above stated. They were doubtless going to the tent reserved for them, and as rental for which they had deposited with plaintiff $1.00, for the purpose of finding a place to cook their meals and make their beds, and to remain there for two or three days before commencing work for plaintiff.

The Court in further discussing the Putnam case on rehearing, on page 55, observes that:

> "But holding plaintiff strictly to the pleading, and assuming for the purpose of this case that it was necessary for deceased to use the ele-

> vator in order to reach the place where her work was to be performed, does not, in my view of the the case, make her a servant of the defendant while so using it, or differentiate her in any way from any other passenger thereon."

In the above case the injured party was at the time of the accident in the elevator going to the fourth floor of the building where she was to begin her service for her employer ten minutes later, but the Court held, even in that case, that "at the time of the accident her time was her own."

In *Haas vs. St. Louis etc. R. Co.,* 111 Mo. App. 706 (90 S. W. 1155), the Court held that a laborer being transferred from one place to another for the purpose of engaging in employment, is a passenger and not an employee.

In *Louisville & N. R. Co. vs. Scott,* 108 Ky. 392 (56 S. W. 674, 50 L. R. A. 381), it is held that travel by an employee, wholly disconnected from his service, made him a passenger and not an employee.

In *C. R. T. Co. vs. Venable,* 105 Tenn. 460 (58 S. W. 861, 51 L. R. A. 886), it is stated that gratuitous carriage to and from work is passenger service.

To the same effect is *Johnson vs. Texas Central Road Co.,* 42 Civ. App. 604 (93 S. W. 433).

In *Williams vs. Oregon Short Line Co.,* 18 Utah 210 (54 Pac. 991, 72 Am. St. Rep. 777), the plaintiff

was traveling on a pass to a place where he expected to obtain employment from the defendant, but the service was not to begin until he arrived at his destination. On this account he was held not to be an employee but a passenger.

In *Harris vs. Puget Sound Electric Railway Co.*, 52 Wash. 289 (100 Pac. 838), a pass was issued as part of the compensation to the employee. That made him a passenger on a train with the operation of which he had nothing to do, although he was going to a distant place to work and his wages were going on at the time of the injury.

There is a lack of harmony in the decisions on the question as to whether under certain circumstances an injured person is a passenger or employee. In none of the cases, except perhaps in actions brought under the state compensation laws, where a liberal rule is always followed, is it held that a person while being transported free of charge and at a period of two days or more before the employment is to commence, is an employee. In the present case let us reiterate these facts: The arrangement or contract for the employment of the Rogans was made August 5th at Portland, in which the plaintiff was to furnish the Rogans free transportation from Salem or Independence to plaintiff's hop yards, where plaintiff's employment was not to commence until September 1st; that the Rogans did not even reach plain-

tiff's property, but were injured while being transported over the highway from Salem to plaintiff's ranch; that no service had been performed by the Rogans; that they were not at the time of their injuries employees, and certainly were not of the class of employees contemplated by the nature and character of the liability indemnity contract entered into between the plaintiff, E. Clemens Horst Company, and the Hartford Accident and Indemnity Company. It may be true that the Horst Company was guilty of negligence through which it became liable to the Rogans for the injuries sustained by them, but in the present case the question is merely whether the employer's liability policy, attached to the complaint, covers such a liability, if liability existed. It is clear from the terms of the contract that the defendant undertook only to indemnify the Horst Company against loss or liability imposed by law upon the assured for damages suffered on account of bodily injuries as the result of accident, by any employee "while at or about the work of the assured described in Warranty 4." Warranty 4 provides as follows:

> "A complete description of the work covered by this policy, the estimated remuneration of the assured's employees, engaged in such work, the premium rate or rates, and the deposit premium are as follows:
>
> "Description of work covered by this policy: Hop picking — including all work incidental thereto."

No hop picking, and no work—either incidental thereto or otherwise—had been performed by the Rogans. It seems clear that the policy was intended to be limited to liability for injuries sustained by employees "while at or about the work of the assured described in Warranty 4."

> "The premium is based upon the entire remuneration earned during the policy period by all employees of the assured (except those specifically excluded in Warranty 5), engaged in the work described in and covered by the policy."

While the basis of the premium may not control, it is proper that it be considered in determining the meaning of the contract, and the above provision supports the theory of the defendant that the insurance contract does not cover damages sustained by persons who had not yet become employees and as to whom no premium was charged or could have been charged. It is also conceded that the policy was intended to cover all the "operations of the assured in Oregon, whether or not such operations are declared under Warranty 4," and that the policy "covers employees of the assured who are hired *and employed* in Oregon, wherever such employees may be temporarily sent in the United States of America or Canada *in the performance of their duties.*" The operations of the assured, however, must be construed to mean its operations in hop picking, because clearly that is the only work or operations in-

tended to be covered, and to which the policy is limited, and the provision for the coverage of employees "hired and employed in Oregon, wherever such employees may be temporarily sent in the United States of America or Canada in the performance of their duties," was evidently intended to apply to employees while in the performance of their duties; that is, employed in hop picking or employment while "at or about the work of hop picking."

The various and somewhat conflicting decisions of the different courts, rendered in connection with state compensation acts, are not controlling in a case like the one now before the Court. The intent of the parties to the contract should govern, and a reasonable interpretation should be applied for the purpose of ascertaining the intent of the parties thereto as gathered from the terms of the contract itself. Under these rules of interpretation of contracts, it seems to us that it is clear that damages suffered by persons, while being transported free by plaintiff two days prior to the time any service was to be performed, are not covered, or intended to be covered by the contract entered into between the parties, notwithstanding any liability on the part of the Horst Company to the Rogans by reason of any negligence on their part while transporting the Rogans from Salem.

The next Oregon case in which the question involved is discussed, is *Susznik vs. Alger Logging Company,* 76 Or., commencing at page 189.

In the statement of the facts, it is said at page 192:

> "The complaint is based upon the theory that at the time of the accident, the parties sustained the relation of passenger and carrier. The answer, after a series of denials, sets up for the first affirmative defense that plaintiff was an employee of defendant at the time he received the injuries."

In the decision, at page 196, it is stated that:

> "There is no substantial conflict in the evidence as to the facts upon which we are to determine whether or not the relation of master and servant then existed. * * * When he (plaintiff) reached Skamokawa, he went to the defendant's logging train, and was directed by the engineer to place his baggage upon the pilot of the engine and get aboard. He rode upon the pilot to the logging camp. Within a very brief period of time after such arrival the accident occurred. He had not left the immediate vicinity of the train, had not reported to the foreman, had not spoken to anyone in charge, was not upon the payroll, and never did any work or received any compensation from defendant. * * * The case at bar is still more decisively differentiated in that plaintiff had never worked for defendant, and had never reached the point where work could be assigned to him. We have read with

> care the English cases cited in the briefs, but they are not convincing upon the facts before us. * * * We conclude that plaintiff was not engaged in the employment of defendant at the time he was hurt." (Page 198.)

The last expression of the Supreme Court of Oregon on the question as to when a party becomes an employee, is in *Wells vs. Clark-Wilson Lumber Company,* 114 Or., commencing at page 297.

In the statement of facts (page 299) it is said:

> "The complaint alleges that pursuant to defendant's instructions plaintiff went to Nehalem Junction, and upon her arrival there the defendant directed her to board the engine of defendant's railroad and be transported to defendant's logging camp; that in accordance with said instructions she boarded the engine of defendant's railway at about the hour of 7 o'clock P. M., and arrived at defendant's logging camp about 9 o'clock. * * * That upon her arrival at the logging camp defendant instructed plaintiff and the other parties on said engine to leave the engine and step on the platform, and in so doing they were assisted by the defendant's superintendent, the plaintiff being the first one to leave the engine; that said superintendent instructed plaintiff to step back so as to make room for the other parties."

And in compliance with this instruction plaintiff stepped back, and was injured by falling from the platform.

The Court in its decision, beginning at page 308, says:

> "The main contention in this case inheres in the definition of the word 'Employment.' In other words, when was this plaintiff employed by the defendant? If her employment commenced with receiving the employment card from the employment agency at Portland, or if it commenced when she accepted transportation at Nehalem Junction, then she is subject to the Workmen's Compensation Act. * * * The contention of the plaintiff is that she was not employed by the company until it actually accepted her services, either by word or act. The case of Susznik vs. Alger Logging Company, 76 Ore. 189 (174 Pac. 922, Ann. Cas. (1917C.) 700, 9 N. C. C. A., 926, and note), would be decisive of this case and would foreclose in favor of plaintiff's contention the whole controversy on this point were it not for the fact that at the time that case was before this court, the statute now existing was not in force and there was no law regulating the transactions between an employment agency and an applicant for work, or between an employment agency and an employer ordering prospective workmen. The statutes herein quoted introduce a new element into the controversy, making an exceedingly plausible argument for the contention of defendant,"

which was to the effect that at the time of the injury plaintiff was an employee. (Page 309.)

Sections of the Oregon Code are then quoted defining the term "employer" under the Workmen's Compensation Law, and in which it is provided that

> "the term 'workman' shall be taken to mean any person, male or female, *who shall engage to furnish his or her services subject to the direction or control of an employer.*"

The Court then observes, at page 310:

> "Now the question arises, at what time did the defendant contract for and secure the right to direct and control the services of plaintiff, and at what time did plaintiff engage to furnish her services, subject to the direction or control of defendant? Let us see whether the statutes quoted solve this question as a matter of law."

The fact that the Rogans had a ticket for a tent in which they were to live after reaching the place of employment, and that they were permitted to ride free from Salem to the place of employment on plaintiff's truck, instead of walking, did not make them employees. In this connection we quote further from the Wells vs. Clark-Wilson Lumber Company case, found on pages 315 and 316 of 114 Oregon:

> "The fact that plaintiff had an employment ticket and was permitted to ride to the place of employment on defendant's train instead of walking, did not make her an employee, and if the train had been wrecked on the way, or if she had suffered an injury while waiting at the station, we have no doubt that the Industrial Accident Commission would have rejected her claim

> on the ground that she was not in actual employment, but was merely on her way to seek employment. * * * Taking the facts that nobody disputes and applying the law to these facts, we think the Court might well have instructed the jury that, as a matter of law, plaintiff was not in the employment of the defendant at the time of the accident." (Page 315.)

The fact that plaintiff was given a free pass upon the logging road of defendant from Nehalem Junction to its camp and headquarters further back in the timber, did not constitute an acceptance of her services.

> "If defendant considered her then in its employ, her wages would have been computed from that date, but, as the checks given her show, her wages were computed and paid from January 1, 1923 (the accident taking place on December 30, 1922). This, while not conclusive, tends to show the construction put upon the contract of hiring by the parties at the time. Yet one may be under such a contract with another as to be a present employee, although the actual work incident to the employment may not be begun until a future day, but we are not dealing now with the question as to when plaintiff actually began work, but with the more important question as to when she entered into such a contract to work as subjected her *eo instanti* to the orders of the defendant." (Page 317.)

Certainly the contract entered into between the Rogans and plaintiff on August 5, under which they were to pick hops for plaintiff beginning September

1st, did not subject them *eo instanti* to the orders of plaintiff. They never became at any time subject to the orders of plaintiff, and in any event they were not employees within the meaning and provisions of the insurance contract.

Referring now briefly to cases dealing specifically with liability insurance questions, and particularly the questions as to when persons are "employees" within the meaning of liability insurance contracts and the rule of construction of liability insurance contracts, it is said in *Employers' Indemnity Company of Philadelphia vs. Kelly Coal Company* (Ky.), 149 S. W. 992 (41 L. R. A. (N. S.) 963), that:

> "Speaking generally, the relation (of master and servant) may be said to exist whenever the employer retains the right to direct not only what shall be done, but how it shall be done. * * * The significant element in the relation of an employee and his employer is personal service. In Wood on Master and Servant, Sec. 317, it is said: 'The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders or misconduct.' In other words, an 'employee' is one who works for and under the control of his employer."

In *Maycreek Logging Co. vs. Pacific Coast Casualty Co.,* 82 Wash. 301 (144 Pac. 67, 55 L. R. A.

(N. S.) (1915C.) 155), which was a case growing out of the alleged unskillful treatment of the employee by the company's physician, it is said:

> "The respondent's liability, of course, depends upon the conditions of its policy. If it has thereby undertaken to answer for losses arising for claims of damages on account of the negligent failure of the appellant to perform a special contract wherein it undertook to furnish an employee with hospital, medical and surgical services, then it is liable to answer to the suit of the appellant; otherwise not. We cannot think the policy bears this interpretation. It purports to cover only losses arising from claims of damages by the appellant's employees on account of accidental injuries suffered by the employees *while in the prosecution of the appellant's logging business,* and the departments dependent upon and the operations connected therewith."

In *Western Indemnity Co. vs. Industrial Accident Comm. of Cal.,* 43 Cal. App. 487 (185 Pac. 306), the appellant insured one P. R. Kennedy who was engaged in the electrical business, against damages on account of injuries or death to employees of the assured "in and during the course of and arising out of the operation of the trade, business or work described." The schedule described the work as "Electrical store. Retail or combined wholesale and retail. Electrical equipment. Installation and repairs within buildings and on buildings incidental to such inside work, including the making of service connections for such work, excluding the installation

of equipment in power plants." The contract covered various classes of employees including "chauffeurs and laborers." One Millard was operator of an automobile owned by the Company, and at the request of Kennedy's son, and while being employed by the company, gratuitously transported a former employee of the company to her home, and while so doing Millard was killed. The Court held that the indemnity company was not liable under its insurance policy, as Millard at the time of the accident was not engaged in work covered by the policy.

In *New Amsterdam Casualty Co. vs. State Industrial Accident Comm.* (Okla.), 193 Pac. 974, the Court said:

> "Certainly the liability of the said company, upon said policy of casualty insurance, cannot be extended by implication beyond the strict terms of said policy. (Citing authorities.) Where parties have entered into a contract with such knowledge of its contents as the law imputes, that alone must be looked to as furnishing the measure of their rights and obligations, and courts will not undertake by construction to compel insurance companies to pay losses which they never assumed. Brown vs. Conn. Fire Insurance Co. of Hart., Conn., 52 Okl. 392 (153 Pac. 173)."

In *Byrd & Bryan et al. vs. Georgia Casualty Co.* (N. C.), 114 S. E. 1, the Court said:

> "Where a policy insures against claims for damages by reason of injuries incurred by em-

> ployees in certain designated operations, it cannot be extended to include claims for injuries happening to employees while engaged in work other than that specified. A policy issued to indemnify against injuries caused by certain things used in a particular business, and described in the application, covers only accidents occurring in such described work, and does not cover those occurring in work or acts which may be employed in the process, but not described in the application."

Jerome Hardwood Lumber Co. vs. Consolidated Underwriters et al. (Ark.), 256 S. W. 68, was a case in which one Tim Ezell was told to go to the engine room of the lumber company and watch as closely as possible in order to learn the work, and it was contemplated that he should go to work shortly thereafter. He was injured that afternoon, and the lumber company sought to recover on an insurance policy indemnifying them against damage for injuries to employees. The Court said:

> "As we have already seen, the evident intention of the parties, as expressed by the terms of the contract, was to insure the plaintiff from liability by reason of injuries which its servants might receive in the operation of its business and while they were being paid a compensation therefor at the time he received his second injury in July, 1921. Therefore the defendant was not liable under the policy sued on for the injury to Ezell."

In *Horseshoe Coal Co. vs. Maryland Casualty Co. et al.* (Ky.), 271 S. W. 670, the Court said:

> "Where a policy insures against claims for damages by reason of injuries incurred by employees in certain designated operations, it cannot be extended to include claims for injuries happening to employees while engaged in work other than that specified."

Even under the Workmen's Compensation Law the rule is:

> "Not only must the formal contracts have been made, but the claimant must have actually entered upon his duties pursuant thereto."
>
> 28 R. C. L. 760.
> Ann. Cas. 1918B. 706.
> 114 N. E. 517.

> "To bring his case within the Compensation Act, the employee must show, as he was required to establish under the common law, that he was at the time of the injury engaged in the employer's business, or in furthering that business, and was not doing something for his own benefit or accommodation."
>
> 28 R. C. L. 804.

> "An injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment when there is * * * a causal connection between the conditions under which the work is required to be performed and the resulting injury."
>
> 28 R. C. L. 797 and 801.

> "The employee gets up in the morning, dresses himself, and goes to work, because of his employment; yet if he meets with an accident before coming to the employer's premises or his place of work, that is not a risk of his occupation but of life generally. * * * A workman is held not to be entitled to compensation for injury occurring in the public street by slipping on the snow or ice or fruit peelings or by collision with passing vehicles. Everything depends, however, upon the nature of the duties performed."
>
> 28 R. C. L. 805.

The fact that plaintiff's automobile truck was being operated exclusively for the transportation of persons to its hop ranch, did not render that service any the less a carrier service under the decisions. See the Putnam case, 68 Ore. 45.

C. R. T. Co. vs. Venable, 58 S. W. 861; 51 L. R. A. 886.

Williams vs. Oregon Short Line Co., 54 Pac. 991.

Harris vs. Puget Sound Elec. Ry. Co. (Wash.), 100 Pac. 838.

On page 28 of plaintiff's brief it is stated, in reference to Judge McBride's decision in the Putnam case, holding that one is not a servant at the time an accident happens if it happens a few minutes before such person is required to begin service, that this

doctrine has been severely criticized and overruled in numerous recent decisions. We do not find the decisions cited by plaintiff's counsel to support this statement, at least so far as the law in Oregon is concerned. The Putnam case is not mentioned in the cited cases, and, in any event, that case is controlling in Oregon.

On pages 28, 29, 30 and 31 of its brief, under the heading "Time Doctrine Discredited," plaintiff cites the following cases:

Cudahy Packing Company vs. Parramore, 16 Utah 161, 207 Pac. 148, 263 U. S. 418, 68 L. Ed. 366.

Novak vs. Montgomery, Ward & Co. (Minn.), 198 N. W. 290.

Stratton vs. Interstate Fruit Co. (So. Dak.), 199 N. W. 117.

Indian Hill Club vs. Industrial Commission (Ill.), 140 N. E. 871.

Roberts Case (Me.), 126 Atl. 573.

Jeffries vs. Pitman Moore Co., 147 N. E. 919.

Brink vs. Wells Lumber Co. (Mich.), 201 N. W. 222.

City of Milwaukee vs. Industrial Commission, 201 N. W. 240.

Barres vs. Watterson Hotel Company (Ky.), 244 S. W. 308.

Each and all of the foregoing cases involved the State Compensation Acts, and in each and all of

them the injured employee was either in the actual performance of his employment, or was upon or in the immediate vicinity of the premises owned or controlled by the employer.

The Cudahy-Parramore case (207 Pac. 148) arose under the provisions of the Utah Workmen's Compensation Law. Parramore "was and for a considerable time had been employed at the plant (Cudahy's) at a weekly salary as a stationary engineer." The Utah Supreme Court affirmed an award of compensation to Parramore's dependents. The Supreme Court of the United States, in reviewing the case, said:

> "By this construction and application of the statute we are bound, and the case must be considered as though the statute had, in specific terms, provided for liability upon the precise facts hereinbefore recited. * * * The question saved in the state court and presented here is whether the statute, as thus construed and applied, is valid under the provisions of the 14th amendment. * * * Parramore could not, at the point of the accident, select his way. He had no other choice than to go over the railway tracks in order to get to his work."

The *Novak vs. Montgomery, Ward & Company* case (198 N. W. 291), was an action under the Minnesota Workmen's Compensation Act. The facts recited in the decision do not specifically so state, but

it may be properly inferred that the injured employe was regularly employed, and it is further stated in that case that—

> "In the instant case the employee was *on the premises of the employer and in its elevator, which was her only means of getting to and from the eighth floor where she worked.* She was on the premises of the employer and the elevator was furnished to provide her a means of conveyance from one part of the building to another. Under such circumstances she should be regarded as an employee, even at common law, and not a passenger. * * * The injuries arose in the course of the employment, and while the employee was being transported on the premises of the employer. * * * In fact the employer required her to use this elevator, and hence its use became an incident of her employment, and if so an injury occurring to her while using the elevator arose out of and in the course of her employment. * * * In the instant case the employee was not only *in, on, and about the premises where her services were performed, but she was also at a place where she was required to be by her employment;* and she is therefore included in the statute."

The *Stratton vs. Interstate Fruit Company* case (199 N. W. 117) arose under the South Dakota State Compensation Law. The facts recited in this case show that at the time of the accident the deceased was an employee, in the actual performance of his duties.

> "The fact remains that at the time of the accident he was engaged in the strict line of his employment."

The *Indian Hill Club vs. Industrial Commission* case (140 N. E. 871) arose under the Illinois Compensation Act. The injured employee

> "was leaving the grounds of the club, and while doing so, but still on the grounds and about 30 feet from the club house, was injured. * * * An injury accidentally received *on the premises of the employer* by an employee while going to and from his place of employment by a customary or permitted route, *within a reasonable time before or after work,* is received in the course of and arose out of the employment,"

(under the provisions of the compensation laws and the liberal interpretation given them.)

The Roberts case (126 Atl. 573) arose under the Workmen's Compensation Act of Maine. In that case

> "The deceased at the time of the accident had just finished his work for the week and was leaving the plant of the "Rendering Company,"

in an automobile over a private way of defendant leading to its plant.

> "Without undertaking to lay down a general rule to cover all cases of this nature, we are of the opinion that the injuries received by the employee in the case at bar were clearly received within the course of his employment, *within the meaning of Section 11 of our* compensation act."

The Jeffries vs. Pitman Moore Company case (147 N. E. 919) arose under the Indiana Workmen's Compensation Act.

> "The private roadway over which Jeffries was going at the time of the accident was in general use by the employees of appellee as the way over appellee's premises to to place of work, and was the only and customary way to go. * * * Under the rule that the Workmen's Compensation Act (Laws 1915, c. 106) must be liberally construed to the end that its humane purposes may be accomplished, a construction of the Act that would limit its benefits to the time the workman was actually at work with his tools at his place of work would be too narrow; so also a construction that would deny compensation for all accidental injuries which did not occur until at or after the moment when the work under the employment contract was to begin. * * * This Court has correctly held that an accident occurs in the course of the employment, within the meaning of the compensation act, when it takes place *within the period of the employment,* at a place where the employee may reasonably be, and while he is fulfilling the duties of his employment, or is engaged in doing something incidental to it. * * * It is also well settled that the period of employment generally includes a reasonable time for ingress to and egress from the place of work *while on the employer's premises* (page 920). * * * We do not mean to hold that under any and all circumstances compensation is to be allowed an employee who is injured on the premises of his employer on his way to work. What we do hold is that where a factory employee, while going to work at the usual and customary time of going, and over a roadway constructed and maintained by the em-

ployer for the use of the employees, in going to and from the factory building, is accidentally killed on such roadway, near his place of work on the premises of the employer, the death is the result of an accident which arose out of and in the course of the employment. * * * The case of Moore vs. Sefton Mfg. Corp. (1924 Ind. App.), 144 N. E. 476, cited by appellee, is readily distinguished. In that case the employee was injured while on his way to a nearby restaurant to get lunch at the noon hour, and was denied compensation. The employee was not required under his contract of employment to go to the restaurant for lunch. He could, as many of his co-employees did, bring his lunch with him and eat the same at the factory. Going to the restaurant for lunch was, under the facts of the case, of his own choosing. As this Court said in its opinion, 'He was doing an act which he was entitled to do, *but he was not doing an act which he owed his employer the duty to do.*' In the case at bar, the employee was, at the time of the accident, going to work, a duty he owed his employer, and was proceeding through the premises of his employer for that purpose."

The Brink-Wells Lumber Company case (201 N. W. 222) arose under the Workmen's Compensation Law of Michigan. In that case Chief Justice Clark says:

"The period going to and returning from work, while not upon the employer's premises, generally is not covered by the act. Livinski vs. Sutton Sales Co., 220 Mich. 647, 119 N. W. 705; Reid vs. Bliss & Van Auken Lumber Co., 225 Mich. 164, 196 N. W. 420. Plaintiff was on the premises of the employer, going from his work,

leaving within a reasonable time, following a customary and permitted route off the premises, and in the immediate vicinity of his labor. It is the general rule that an employee, under such circumstances, is still in the course of his employment,"

(under the Workmen's Compensation Acts.)

"There are exceptions of course, such as where the employer's premises are a railroad, stretching endless miles across the country, and the accident happens at a place far removed from the actual place of employment."

The Court cites *Hills vs. Blair* (Mich.), 148 N. W. 243, to the effect that—

"The employment is not limited by the exact time when the workman reaches the scene of his labor and begins it, nor when he ceases, but includes a reasonable time, space and opportunity before and after, while he is *at or near his place of employment.* One of the tests sometimes applied is whether the workman is still on the premises of his employer. This, while often a helpful consideration, is by no means conclusive. * * * It is not a sufficient test that the workman should be on the premises of the employer; but it may be sufficient that *he is in such a state of proximity as may be treated as a reasonable margin in point of space.*"

City of Milwaukee vs. Industrial Commission (Wis.), 201 N. W. 240. This case arose under the Workmen's Compensation Law. In this case—

"A tool house had been constructed upon or in close proximity to the works and very near

> the tracks of the Chicago & Northwestern Railroad. At about 8 o'clock A. M. of the day in question, Schmitt reported at this tool house, secured the tools that it was necessary for him to use in his work, and proceeded to the place where he was required to work during the day."

He was killed while proceeding from the tool house to his place of work.

> "It is manifest that he entered upon his employment when he reported at the tool house and obtained the tools with which he was to work during the day."

The *Barres vs. Watterson Hotel Company* case (244 S. W. 308) arose under the Workmen's Compensation Law of Kentucky. The Court in that case, in stating the facts, said:

> "Appellant, Edith A. Barres, was a regularly employed maid at the Watterson Hotel in Louisville. At the close of the day's work she removed her apron and put on her street dress for the purpose of leaving the hotel on her way home. She was on one of the upper floors of the hotel. She entered an elevator operated by the hotel for carrying its employees and other needs of the establishment, and had started for the ground floor. In transit a large piece of metal fell from the top of the elevator shaft and struck appellant on the head, inflicting a severe injury, which caused paralysis of her body. She brought this action against the hotel company to recover $50,000.00, alleging negligence on the part of the company."

The Court held that the plaintiff was at the time an employee and within the terms of the Workmen's Compensation Law.

> "An employee on the premises of the master at the close of the day, while dressing or otherwise preparing to leave the premises, and while leaving the premises in the usual way, is in the course of his employment. * * * As it was necessary for appellant to enter on and leave the premises of the hotel company, in the performance of her duties, and her duties did not cease until she was off the premises of her employer, it was clear that she was at the time of her injury in the course of her employment within the meaning of the Act."

The principles enunciated in the foregoing cases certainly do not support the plaintiff's position in the present case, in which the admitted facts show that the injured parties had not reached the premises, nor even close thereto, so far as is disclosed by the record, and where the time for the commencement of the services under the contract was more than two days after the date of the injury. The liability of defendants in this case, if any, rests, not upon the interpretation placed upon the provisions of the Workmen's Compensation Act, but exclusively upon the terms and meaning of the insurance contract.

Plaintiff in its brief (at page 31), under the title head of "Susznik Decision Distinguished," attempts

to show that the Susznik decision is not controlling in the present case, because it is based upon the ground that Susznik was not engaged in the employment of the Alger Logging Company at the time he was hurt. This is exactly what we are contending for in the case under consideration—that the Rogans were no more "employees" at the time of the accident than Susznik was at the time he was injured; they were not at the time of their injuries in the employ of the plaintiff; and we also insist that the principles of law announced in the Susznik case are applicable and controlling in the present case. In that case the Court held, that although Susznik had arrived upon the premises of the logging company, he

> "was not upon the payroll, and never did any work or receive any compensation from defendant. Under these conditions, we are called upon to determine whether or not the plaintiff was an employee of defendant in the sense that he was entitled to indemnity under the Compensation Act of the State of Washington, and thereby barred from bringing this action."

The Court then refers to the Putnam case, quoting from that portion thereof, with approval, wherein in it said that—

> "At the time of her (plaintiff's) accident her time was her own; she was not a servant of the defendant until it was time for her to begin such service."

And then the Court states in its decision in the Susznik case:

> "The case at bar is still more decisively differentiated, in that plaintiff had never worked for defendant, and had never reached the point where work could be assigned to him * * * We conclude that the plaintiff was not engaged in the employment of the defendant at the time he was hurt."

The fact that the Rogans were being transported free does not help the plaintiff in this proceeding. Whether the transportation was gratuitous or deemed a part of the compensation to be paid for the services to be rendered by the Rogans, would not strengthen plaintiff's position. The transportation of the Rogans was a carrier service furnished the Rogans by plaintiff. They were not under a salary. The Rogans were not to be paid for making the trip from Portland or Salem to plaintiff's hop yards. The act of going from Portland to Salem, and thence to the hop yards, constituted no part of the service to be rendered by the Rogans. They were not at that instant, or at any time, subject to plaintiff's direction or control. And in any event, we reiterate that, even though it is determined that as between the Rogans and plaintiff, the Rogans should be deemed employees, they were not employees within the terms or meaning of the insurance contract—they were not engaged in hop-picking or any other work incidental to hop-picking.

If plaintiff was guilty of actionable negligence in the transportation of the Rogans, as it now insists it was, the Rogans should have been compensated therefor by plaintiff, but plaintiff is not entitled to recover of this defendant on account of its acts of negligence, clearly not intended to be covered by the terms of the policy.

We have both "glanced at' 'and "checked" the authorities as suggested on page 37 of plaintiff's brief, but without finding any reason to change our position as stated in our original brief, filed with the trial court. We have no reason to feel that the rules as announced in the Putnam, Susznik and Wells cases, have been in any manner overcome by the ingenious argument of plaintiff's counsel.

The Sala vs. American Sumatra Tobacco Company case, referred to on page 39 of plaintiff's brief, arose under a state compensation law. The fact that plaintiff in that case was entitled to be compensated under the Compensation Act of Connecticut, does not overcome the rule announced in the Putnam and other Oregon cases, neither does the rule therein announced apply to the case under consideration. In other words, even though the Court should find, under the decisions rendered under compensation acts, that the Rogans were entitled to recover of plaintiff on account of plaintiff's negligence, there is nothing in these decisions to justify the holding that plaintiff corporation is entitled to recover from this

defendant for its negligence, if any, in transporting the Rogans.

On page 46 of plaintiff's brief the statement is made that—

> "The actual work of hop picking was to begin when the Rogans reached Eola Ranch. The actual employment began when the Rogans boarded the automobile truck at Salem, and continued during the trip, and at the time the accident occurred."

On page 26 of plaintiff's brief it is even claimed that—

> "It must be obvious, therefore, that the Rogans became employees of the Horst Company at Portland, on August 5, 1925, although actual work incident to their employment was not to begin until September 1, 1925."

It is difficult to understand how plaintiff can justify itself in these positions.

Under the Oregon decisions the Rogans were not employees even under the Compensation Act, but granting that they were employees at the time of the accident under the Compensation Act, they were not employees within the terms of the insurance contract.

On page 36 of its brief plaintiff frankly admits the correctness of the rule contended for by defendant, namely:

> "That where an employee receives an injury by accident on his way to work, before he has

> reached the employer's premises, or on his way from work, after he has left such premises, the accident can not be said to arise through or out of or in the course of the employment."

In a case arising under the Workmen's Compensation Act of Maine, decided January 24, 1927 (Paulauski's Case, 135 Atl. 824), the Court says:

> "From the reasoning of decisions of unquestioned standing it may be deduced that the words 'out of' refer to the origin, or cause, of the accident, and the words 'in the course of' to the time, place, and circumstances under which it occurred, and we hold that an accident occurring upon a public way, when the employee is prosecuting no duty incumbent upon him by reason of his employment, is not compensable because not arising out of his employment, and not occurring in the course of his employment. For decisions from other jurisdictions holding as above, see Reed vs. Bliss et al., 225 Mich. 164, 196 N. W. 420 (1923), and cases cited therein and appended thereto, and decisions of this court, Westman's Case, 118 Me. 133, 106 A. 532; Mailman's Case, 118 Me. 180, 106 A. 606; Fogg's Case, 125 Me. 168, 132 A. 129; and Johnson vs. Highway Commission, 125 Me. 443, 134 A. 564."

In another late case arising under the Workmen's Compensation Act of Texas, decided January 27, 1927 (London Guaranty & Accident Co., Limited, vs. Smith, 290 S. W. 774), the Court said:

> "Appellee was employed as a saleslady in a dry goods store. When she was injured she was going to her boarding house to eat her evening

> meal. She rode from the store with a friend to a point in front of her boarding house, where she got out of the car, and, while crossing the street, was struck by another passing car, and injured. She expressly stated she was not performing any errand for her employer or delivering any parcel or doing anything relating to her employment. She was merely going home for her evening meal. To come within the meaning of the term 'injury received in the course of the employment,' it must be shown that the injury originated in the work, and, further, that it was received by the employe while engaged in or about the furtherance of the affairs of her employer. American Indemnity Co. vs. Dinkins (Tex. Civ. App.), 211 S. W. 949."

In the very recent case of Boyle-Farrell Land Co. vs. Standard Acc. Ins. Co., in the March 29, 1928, Advance Sheet (Vol. 24 (2d)—No. 1), Federal Reporter, at page 55, decided by the United States Circuit Court of Appeals for the Eighth Circuit, the plaintiff in error was denied recovery in a suit upon a policy of liability insurance. He was injured while riding upon his employer's logging train, claiming that he was granted this privilege. He recovered from his employer a judgment for $18,500.00, and the employer sought to recover this amount from the insurance company. The Court held that—

> "At the time of the accident, the employee was admittedly not engaged in his specific occupation as a log cutter. The defendant insured plaintiff against loss for damages on account of bodily injuries accidentally sustained by reason

of *the operation of its business.* Such operation was defined to be 'all work incidental to the manufacture of lumber, including operations of logging railroads, maintenance and extension of lines and all repair work; also including contractors, subcontractors and their employees (employees of the assured riding on logging railroad to and from work covered by this policy), logging railroad operations, including the hauling of freight and switching, and all other employees except office and store employees.'

"A reasonable interpretation of this provision would mean that recovery might be had where the employee accidentally sustained bodily injuries while engaged in work 'incidental to the manufacture of lumber.' Clearly Haynes was not engaged at the time of his injury in any work 'incidental to the manufacture of lumber.' *He was doing no more than using the benefits of his contract of employment which entitled him to medical attention and treatment. In carrying out such contract, plaintiff undertook to transport him from its logging camp to Farrell and return.* The policy in suit did not cover all the relations of employment, but limited the liability of the defendant to the relationship that existed while the employee was actually engaged in the work of his employment. . *To warrant recovery under an employers' liability policy,* the injured employee must have been one not only covered by the policy but at the time *'must have been engaged* in the business thereby insured or in some work *incidental thereto.'*

"It is the contention of the plaintiff that 'the sole question involved in this case is whether or not Haynes was an employee at the time he was injured.' Let it be conceded that he was such

an employee, yet plaintiff would not be entitled to recover upon the facts in this case.

> "The contract of insurance did not undertake to insure the employees as such. The liability assumed was only for accidental injuries sustained in the operation of the business, which was defined as 'all work incidental to the manufacture of lumber.' Clearly the injured employee was not engaged in work incidental to the manufacture of lumber, nor was he riding on the logging train to and from his work as stipulated in the policy. He was not engaged in the work of his employment when injured. The decision of the Supreme Court of Arkansas was not based upon the ground that Haynes was injured while engaged in work, but that he was being carried as a passenger as a part of his contract of employment."

On page 50 of plaintiff's brief it is said that we rely upon and quote extensively from the Susznik and Wells cases, and that both of these cases were within the terms of of the Workmen's Compensation Laws. We concede the statements to be correct, and we say that even under the compensation laws the Rogans, under the rules announced in these and other cases, were not employees at the time of their injuries.

Neither do the numerous decisions cited by counsel based upon Workmen's Compensation Acts, have any proper place in determining the questions before the Court in the present case. The law properly controlling the entire situation is the law of contracts,

and specifically the interpretation of insurance contracts. Decisions and authorities relating to these matters are referred to above.

The risk or dangers to which the Rogans were exposed in the transportation were those to which they would have been equally exposed apart from their employment. This conclusion is not affected by the fact that the Rogans would not, except for the employment, have been where such dangers or hazards existed. An injury does not arise out of the employment unless the hazard causing it is, within reasonable apprehension, an attribute of or peculiar to the specific duties of the employment.

The only hazards covered by the insurance policy are those incidental to hop picking. The contract does not include the hazards of traveling from Salem to plaintiff's hop ranch three days prior to the time the services covered by the insurance contract were to commence.

Pages 53 to 60 of plaintiff's brief are devoted to a criticism of Judge Bean's decision upon the demurrer to the complaint. A sufficient answer to these criticisms is the decision itself and the Boyle-Farrell Land Co. case cited above.

Respectfully submitted,

GRIFFITH, PECK & COKE,
JOHN S. COKE,
Attorneys for Defendant in Error.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. CLEMENS HORST COMPANY,
A CORPORATION,
Plaintiff in Error,

VS.

THE HARTFORD ACCIDENT AND INDEMNITY COMPANY,
A CORPORATION,
Defendant in Error.

Petition of Defendant in Error for Rehearing

Upon Appeal from the United States District Court for the District of Oregon.

BROBECK, PHLEGER & HARRISON,
RIDGWAY, JOHNSON & KENDALL,
Attorneys for Plaintiff in Error.

GRIFFITH, PECK & COKE,
Attorneys for Defendant in Error.

J. R. ROGERS, PRINTER, PORTLAND, OREGON

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VS.

THE HARTFORD ACCIDENT AND INDEMNITY COMPANY,
A CORPORATION,
Defendant in Error.

Petition of Defendant in Error for Rehearing

The defendant in error respectfully petitions the Court for a rehearing herein, upon the grounds that the Court, in reversing the judgment of the Court below, was in error in the following particulars, namely:

1. That the Court erred in its determination of the law herein.

2. That the Court erred in overlooking material matters in the record, and especially the stipulation of the parties filed herein.

3. That the Court erred in its finding and conclusions that W. P. Rogan and wife were employees of plaintiff in error within the terms of the contract of insurance at the time they received their injuries.

4. That the Court erred in not affirming the decision and judgment of the District Court herein.

Defendant in error appends hereto its brief.

Respectfully submitted,

GRIFFITH, PECK & COKE,
JOHN S. COKE,
Attorneys for Defendant in Error.

Brief of Defendant in Error in Support of Petition for Rehearing

As the very foundation of plaintiff's right to recover it was necessary that the Rogans must have been employees of plaintiff. If they were not employees at the time of the accident, it is not necessary to discuss the other provisions of the policy. Can it then be properly said that they were at the time employees, in view of the admitted fact that the only work they were to perform was hop picking and that

such work was not to commence for more than two days after the date of the accident? To constitute them employees at the time they must have been subject to the direction and control of plaintiff as its employees.

The facts are, as stated in effect in *Boyle-Farrell Land Co. vs. Standard Acc. Ins. Co.,* March 29, 1928, Advance Sheet (Vol. 24) (2d), No. 1), Federal Reporter, at page 55, that they were doing no more than using the benefits of their contract, which entitled them to free transportation from Salem to plaintiff's hopyards. They were not then performing any service for plaintiff, but were wholly engaged in an act which was for their own benefit and advantage. Under the terms of the policy, they must not only have been employees, but they must at the time have been engaged in the performance of their duties. The written stipulation of the parties filed herein specifically states that the only work to be performed by the Rogans under said contract was to pick hops for the plaintiff at .... cents per pound, and no such work was ever actually performed by either of said Rogans for plaintiff. This stipulation utterly and completely refutes plaintiff's claim.

If picking hops was the only kind of work which the Rogans were to perform, then hop picking was the only kind of work covered by the policy. The parties to this action are bound by the terms of the

stipulation, and a finding contrary to its terms cannot properly be made.

The Court in its decision apparently overlooked this stipulation and the effect thereof.

In its decision the Court suggests that "where a policy of insurance is so framed as to leave room to two constructions, the words used should be interpreted most strongly against the insurer." If it can properly be said that the terms of the policy are ambiguous, then the rule as stated by the Court would be correct. However, we contend that there is no ambiguity in the insurance contract, and therefore that it should be interpreted as any other written contract. In any event any and all question of ambiguity is completely removed by the written stipulation, as well as any question as to whether the Rogans were at the time of the accident employees.

The policy provides that the employees covered by its terms must not only be "hired," but they must also be "engaged * * * in the performance of their duties." The stipulation specifically agrees that they were not in the performance of any duty for the plaintiff, and provides that the only work to be performed by them was to pick hops and that no such work was actually performed.

If, prior to the making of this stipulation, the policy would have covered the Rogans while riding

in plaintiff's truck, the question as to such coverage is completely removed from consideration under the terms of the stipulation.

The conclusion reached by the Court that the risks and hazards of the work of plaintiff were mainly confined to the hauling of operatives between railroad stations and the hopyards, is not justified by the record. We think we are safe in assuming that the great majority of the employees of plaintiff in its hop picking operations *made no use* of the free transportation offered. Doubtless if plaintiff had been doing a transportation business the premium rate would have been much higher than was charged to it.

The Court distinguishes the *Wells vs. Clark-Wilson Lumber Co.* case (114 Ore. 297), and the *Susznik vs. Alger Logging Co.* case (76 Ore. 189), from the case at bar. However, the Court must have overlooked the case of *Putnam vs. Pacific Monthly* (68 Ore. 36), referred to at pages 19 to 26 of the brief of defendant in error on the appeal. In that case the injured girl, prior to the time of the accident, had been regularly employed by defendant. She was at the time of the accident in an elevator exclusively in the control of the defendant, and was going to the fourth floor of the building where she was to commence her daily work ten minutes after the time of her injury. Even in these circumstances the Court

said she was not then in defendant's employment; that her time was her own. In the case at bar the time of the Rogans was their own; they were nearly three days removed from the period when their time was to become that of the employer; they were not under compensation; they owed the plaintiff no duty and performed no service.

It is stated in the opinion in the case at bar that "plaintiff had the right to direct the movements of the Rogans." The defendant in the Putnam case had a much greater right to direct the movements of the plaintiff, in that she had been a regular employee for some time prior to the time of the accident; she was in defendant's elevator proceeding to the fourth floor of the building where she was to commence her work ten minutes later.

We respectfully submit that the Court had erroneously interpreted and applied Wood on Master and Servant, Section 317, wherein that author says:

> "The real test by which to determine whether a person is acting as the servant of another is to ascertain whether at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged by him for disobedience of orders or misconduct."

It cannot be said that the Rogans were at the time of their accident subject to plaintiff's order and control and liable to be discharged for disobedience of orders. How could the Rogans have been discharged when they had not yet placed themselves under plaintiff's employment?

In the *Cudahy Packing Co. vs. Parramore* case (26 U. S. 426), cited by this Court in its decision, the U. S. Supreme Court held that it was bound by the Utah Supreme Court's construction of the Compensation Act of that state, and, therefore, adopted its interpretation. It is further said in that case that "Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract."

In the instant case we are not concerned in the liberal construction placed upon Compensation Acts in the interests of workmen, but only concerned in the law of contracts. As between the two corporations to this action, the liberal constructions placed upon Workmen's Compensation Acts by the Courts are not applicable. The question here is, What was the intention of the parties to the insurance contract? That contract and the stipulation plainly answer that question. The insurance policy undertakes to indemnify the assured against loss by reason of liability imposed by law upon the assured for damages on account of bodily injuries suffered by any *employee while at or about the work of the assured,*

and the stipulation says that the only work to be performed under the contract with plaintiff was "to pick hops for plaintiff at .. cents per pound, and no such work was actually performed by either of said Rogans for plaintiff."

All of the cases cited by the Court in its decision, except the Oregon cases and the *L. & G. Ins. Co. vs. Kearney* (180 U. S. 132), and the *Employers' Indemnity Co. vs. Kelly Coal Company* (149 S. W. 992), were cases brought under the Compensation acts of various states. We earnestly urge that these cases are not in any way controlling in a case like the one at bar. The compensation cases are given a liberal and different interpretation and application, because the Compensation acts are held to be remedial in their nature and purpose and are therefore liberally construed. Under those cases it is held that a person being transported to his place of employment, especially if it is closely connected with the time and place of employment, is an employee. The case at bar cannot be properly determined on the principles of these Workmen Compensation cases. This case properly involves only the construction of the terms of a written instrument, and that instrument should be interpreted as other written instruments, namely, by reference to its own provisions.

CONCLUSION

For the reasons above stated, we respectfully submit that the Court erred as stated in the petition, and particularly in holding that the Rogans were employees of the plaintiff in error at the time of their injury, and erred in failing to give effect and meaning to the stipulation filed herein, and defendant in error respectfully petitions the Court to grant it a rehearing and that an order and judgment may be made herein affirming the judgment of the District Court.

Respectfully submitted,

GRIFFITH, PECK & COKE,
JOHN S. COKE,
Attorneys for Defendant in Error.